IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No.: DA 18-0679

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF MONTANA; MONTANA WASTE SYSTEMS, INC. d/b/a NORTH VALLEY REFUSE; and EVERGREEN DISPOSAL, INC.,
Petitioners/Appellees,

v.

MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION,
Respondent/Appellant,

and

BIGFOOT DUMPSTERS & CONTAINERS, LLC,
Intervenor/Appellant,

NORTHWESTERN ENERGY,
Amicus Curiae.

APPELLEES' BRIEF

On Appeal from the Montana First Judicial District Court, Lewis & Clark County
Honorable James P. Reynolds, Presiding
Cause No. DDV-2018-318

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I. STATEMENT OF THE ISSUES

Appellants Montana Public Service Commission ("PSC") and Big Foot Dumpsters and Containers, LLC ("Big Foot") have not clearly stated the legal issues raised on appeal, therefore, Appellees Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana; Montana Waste Systems, Inc., dba North Valley Refuse; and Evergreen Disposal, Inc. (jointly, "Appellees") restate the issues, as follows:

(1) Whether the District Court abused its discretion by granting immediate review of the PSC's actions and preliminary injunction, where the Court found the PSC violated statutes, and Appellees' constitutional due process right to a fair hearing before a neutral adjudicator, and thus appeal after final agency decision would be rendered meaningless;

(2) Whether the District Court abused its discretion in the scope of the relief granted, where the District Court tailored a remedy that balanced the PSC's statutory and constitutional violations with the applicant's statutory right to a decision on its application;

(3) Whether the PSC waived any right to complain about the relief granted given that it failed to file an Answer or Response to the Petition.

II. STATEMENT OF THE CASE

This case arises from a MAPA-designated contested case before the PSC between Big Foot, an applicant for a Class D Certificate of Public Convenience and Necessity issued by the PSC, and Appellees, who protested the application. Appellees were compelled to file a petition with the District Court seeking immediate judicial review under MAPA, a temporary restraining order, injunctive relief, and writs of supervisory control, mandate, and prohibition after the PSC ignored its governing statutes, administrative rules, and the procedural order in the case and issued discovery requests as an advocate, in addition to acting as adjudicator, and after it appeared the applicant had either copied the PSC's discovery requests, or had been provided such discovery *ex parte* by the PSC.

After granting a temporary restraining order, the District Court held a show cause hearing and briefing was submitted by all parties. Thereafter, the District Court concluded the PSC's actions were contrary to statute, administrative rule, and the PSC's procedural order, and violated Appellees' constitutional right to due process of law and fundamental fairness at hearing where the Commission: (1)

issued discovery contrary to all governing statutes, administrative rules and orders, and thus became an advocate and adjudicator of a contested case, where the same staff attorney who issued the discovery would decide the merits of any objections thereto; and (2) allowed staff to engage in *ex parte* communications with the applicant's attorney, providing legal research and guidance which was discussed with the Commissioners. After making these findings, as well as considering Big Foot and the PSC's countervailing concern that the Big Foot application should expeditiously proceed to hearing, the District Court partially granted Appellees' petition and enjoined the PSC from issuing discovery or hearing the application, implicitly enjoined the PSC from hearing the matter and, in order to allay concerns regarding further delay to Big Foot's application, ordered the PSC to appoint an independent hearing examiner to oversee the hearing on Big Foot's application.

Now, the PSC and Big Foot take issue with the scope of the relief granted and ask this Court to remand the case to the PSC to review what the District Court has already found to be statutory and constitutional due process violations. The District Court found these violations sufficient to justify removing PSC Commissioners or staff from overseeing the Big Foot application hearing, and deciding thereon. There is no authority to support remand to the agency to review

a determination by a district court that the agency has violated fundamental due process rights.

III. STATEMENT OF FACTS

To understand how the parties came to this Court, it is necessary to understand both the regulatory scheme at issue and the factual history of this matter.

A. The PSC's Regulation of Garbage Hauling

Absent certain exceptions not at issue here, no person or entity may haul garbage for hire in Montana without first obtaining a Class D Certificate of Public Convenience and Necessity ("PCN") issued by the PSC. If a person or entity applies for a PCN, existing garbage haulers in the applied-for service area may protest the application, triggering a contested case hearing under MAPA. Mont. Code Ann. § 2-4-102; *Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dept. of Pub. Serv. Regulation*, 284 Mont. 245, 944 P.2d 210 (1997). The burden is on an applicant to prove that an application should be granted, by a preponderance of the evidence. *In re Application of Barber Transportation Company*, Dkt. T-7375, Order No. 4934a, April 8, 1985, at ¶ 4; *In re Application of Hoye*, Dkt. T-95.73.PCN, Order No. 6397a, April 30, 1996, at ¶ 35.[1]

[1] Copies of these PSC Orders are attached to the Petition at Dkt. 1.

Traditionally, the PSC has handled a Class D PCN application hearing by designating a commissioner as hearing examiner and by hearing testimony and taking evidence at a trial-like setting between the applicant and protestants, with the PSC Commission or Commissioners advised at the hearing by one or more PSC staff attorneys. Mont. Code Ann. § 69-12-321. Customarily, the PSC has provided for limited discovery between the applicant and protestants in the form of data requests submitted by each to the other, as well as depositions by the parties in some circumstances. Mont. Admin. R. 38.2.3301. Prior to the application at issue here, the PSC had never before proffered discovery to a party prior to a Class D PCN hearing. Exh. 11 to Dkt. 1.

After a hearing on the application is held, the PSC's staff attorneys assigned to the case compose a memorandum summarizing the facts ascertained at the hearing, as well as the appropriate legal analysis, and make a recommendation for decision. *See, e.g.* Staff Memorandum, PSC Dkt. T-18.6.PCN, a copy of which is attached hereto as Exhibit A. Thereafter the PSC makes a decision as to whether the applicant has met its burden of proof. This includes determining whether the PCN should issue given the statutory and precedential considerations relevant to the PSC's determination in light of the facts presented at hearing. Mont. Code Ann. § 69-12-323.

B. Timeline of Events

After being informed by the PSC that its hauling operations—conducted without first obtaining the requisite PCN—were unlawful, on January 8, 2018, Big Foot filed an application for a PCN with the PSC to serve all of Flathead County with full service garbage removal. AR 1. On February 12, 2018, Appellees, all of whom operate in areas of Flathead County, timely protested the application, triggering a contested case hearing under MAPA. AR 4-6.

On March 6, 2018, the PSC issued a Procedural Order setting deadlines and a hearing date for the Big Foot application. AR 8. That Order set out the dates for discovery (termed "data requests" in PSC proceedings) to issue. Of significance, the order described the parties to the proceeding as Big Foot and Appellees, and stated that "[a] **party** must serve a copy of every . . . data request . . . on every other party with a copy sent to the Commission." *Id.* at ¶ 8. This distinction between parties to the proceeding and the Commission is maintained throughout the Order. *See, id.* As to discovery, the Order provided, citing Mont. Admin. R. 38.2.3301(2), that the exchange of information among "**parties**"[2] pursuant to data requests is the primary method of discovery in proceedings before the

[2] Per Mont. Admin. R. 38.2.901, "[p]arties to proceedings before the commission are known as applicants, petitioners, complainants, defendants, respondents, intervenors and protestants." A party is thus not defined to include the Commission. And, Mont. Admin. R. 38.2.3301(2) makes clear that the rules are not meant to limit "free use of data requests among the parties." (Emphasis added).

Commission. *Id.* at ¶ 9. Finally, the Order provides, "staff attorneys Jennifer Hill-Hart and Jeremiah Langston will act as examiners for the limited purpose of disposing of discovery disputes (including objections to data requests and motions to compel) and motions for protective order in this proceeding." *Id.* at ¶ 17.

In response to the parties' request, on March 20, 2018 the Commission issued a revised Procedural Order to extend the deadline for submission of data requests. That Order contained the same substantive provisions as the previous Procedural Order.[3] AR 18.

On March 19, 2018, Appellees unexpectedly received discovery requests from the PSC, a non-party. The PSC had never before issued discovery in a Class D PCN application proceeding. *See* AR 10-12. Although the PSC's data requests were not signed, the requests came with a cover letter from Jennifer Hill-Hart—the same staff attorney who was delegated the duty of adjudicating discovery disputes per both Procedural Orders. AR 8; 20. Later that afternoon, Appellees received data requests from Big Foot which, in part, mirrored the PSC's requests to Appellees. *See* AR 14-16.

[3] Although the PSC now argues its Notice of Staff Action allowed staff to conduct discovery (*see* PSC Brief at 4), at the hearing the PSC acknowledged that its Procedural Orders (issued by the Commission, not staff) did not contemplate PSC-issued discovery. Trans. 42:17-24; 57:8-13 ("your Honor, you pointed out that we did not contemplate the Commission issuing data requests in our procedural order. **We're inclined to think that's a fair reading of what obligations the Commission has.**") (Emphasis added.)

Concerned with the PSC's ignoring governing statutes and overstepping its role as adjudicator and assuming an advocacy role, concerned that the same attorney who issued discovery would decide upon disputes related thereto, and concerned with the fact it appeared Big Foot had either copied requests made by the PSC, or obtained them through *ex parte* communications, on April 10, 2019, Appellees were compelled to file a *Petition for Review of Agency Action, Temporary Restraining Order, and Preliminary Injunction, Writ of Supervisory Control, Writ of Mandate, and Writ of Prohibition* to preserve their rights to a fair hearing before an impartial adjudicator (who was not also serving as advocate). Dkt. 1. Therein, Petitioners sought immediate review of the PSC's decision to issue discovery, including a temporary restraining order ("TRO") and preliminary injunction, alleging that the PSC taking on a combined advisory and adjudicatory role would violate their right to due process of law. *Id.* Such immediate review was necessary because the PSC sought information that, if disclosed, would have the potential to irreparably harm Appellees. *Id.* at ¶¶ 28-30; *see also* Mont. Admin. R. 38.2.4806(2) (filing motion for reconsideration does not stay or postpone compliance with PSC's Orders).

In response to the Petition for Judicial Review, the PSC filed a response with the District Court arguing (1) there were adequate remedies available to Petitioners

following final PSC review of the case; and (2) the Commission's role at hearing included more than adjudicating whether a PCN should issue. *See* Dkt. 3.

The District Court disagreed with the PSC, and granted a TRO on May 4, 2018, and set a hearing on the request for preliminary injunction for May 16, 2018. *See* Dkt. 16. In its order the District Court cited Mont. Code Ann. § 2-4-701 and "conclude[d] that Petitioners . . . do not have an adequate remedy through the administrative agency process and petition for judicial review of any administrative decision pursuant to the Administrative Procedures Act." The Court also found that "Petitioners ought to be able to avoid the expense, delay, and inconvenience of going through an illicit procedure." Dkt. 16, at 5. Therefore, the Court found "the Petitioners have established their *prima facie* case for the issuance of a preliminary injunction against the Montana Public Service Commission" and set a hearing to allow the PSC to show cause why an injunction should not issue. *Id.* at 5-6

After the TRO issued, Appellees obtained documents from Big Foot in response to data requests, as well as documents produced by the PSC in response to an open records request made by Appellees. Through these documents, Appellees learned that Big Foot had not in fact copied the PSC's discovery requests after they were served via email on the parties. Instead, the documents

revealed counsel for Big Foot had been engaging in a slew of *ex parte* communications with the very same PSC attorney who had been assigned to the Big Foot case, who had issued the PSC's discovery, and who had been assigned to adjudicate discovery disputes. *See* Dkt. 17. That PSC attorney had provided Big Foot's counsel with discovery she believed to be relevant, and had herself copied that discovery, which was sent to Appellees on behalf of the PSC, from discovery issued by an applicant in a prior PCN application. Thus, the very same PSC attorney who proffered discovery, and who would decide discovery disputes, also provided instruction to Big Foot's counsel—*ex parte*—on the discovery she thought Big Foot should ask. *Id*. at 9-10. Appellees believed the PSC and Big Foot's discovery requests were impermissible and filed appropriate objections thereto. But, given that the PSC attorney who drafted the discovery requests and then shared them with counsel for Big Foot would decide upon all discovery disputes, there was no reasonable chance Appellees would have received a fair ruling from the PSC attorney acting as both advocate and judge on these issues.

And, to compound the matter, the PSC's staff attorney further provided Big Foot's attorney with advice on what to submit as part of a motion to compel discovery, and provided legal research to help further Big Foot's position. *Id.* As a result of this new information, Appellees asked the District Court to issue a

preliminary injunction and resolve the due process issues surrounding these *ex parte* communications by submitting the matter to an independent hearing examiner. *Id.*

On May 16, 2018, the parties attended a show cause hearing before the District Court. At the hearing, the PSC's attorney acknowledged the PSC had agreed on May 14, 2018 to withdraw its data requests. Hearing Transcript ("Trans.") 42:23-25. Thus, the focus of the hearing was on the *ex parte* communications, and whether those communications, and conversations between staff attorneys and the PSC Commissioners, violated Appellees' constitutional due process rights to a fair hearing before a neutral arbiter.

At that hearing, both the PSC and Big Foot expressed concern regarding any action that would further delay the hearing on Big Foot's application. Trans. 56:22-57:24; 79:12-81:2 (noting that Big Foot would agree to appointment of an independent hearing examiner, "whatever to keep the case going so that our client can get to their hearing"). Contrary to Big Foot's allegations, the District Court did not deny the PSC any right to present testimony—instead, when told the Court hadn't anticipated live testimony, the PSC's counsel merely responded "Okay."

Trans. at 40:4-8.[4] And, contrary to Big Foot's insinuations, counsel for Appellees did not have *ex parte* communications with the PSC—as explained at hearing, the undersigned has in the past (well before Big Foot's application) had an employee copy all relevant PSC orders to create a document bank. Trans. 81:7-15; *see also* Mont. Admin. R. 1.3.233 (Agencies must maintain an index of all final orders and decisions, and all final decisions and orders must be available for public inspection on request).

At the conclusion of the hearing, the Court asked all parties whether they believed additional briefing was necessary. All parties agreed that no additional briefing was necessary regarding the preliminary injunction. Trans. 98:24-99:11. Despite stating no additional briefing was necessary, Big Foot submitted a Response Brief on May 17, 2018. Petitioners felt compelled to reply thereto, and did so, on May 22, 2018. *See* Dkts. 24, 28. On June 15, 2018, Appellees filed supplemental information with the Court noting that, based upon additional information produced by the PSC, Appellees had ascertained that the PSC's

[4] Big Foot states this was to produce "testimony regarding Appellees' own ex parte communications." In reality, as demonstrated by the documents submitted by the PSC with Ms. Koch's affidavit, the reality was that a representative from Appellees (not legal counsel) contacted PSC staff to report illegal garbage hauling before Big Foot's application was filed, and thereafter provided additional information in response to the PSC staff's request to "Please let me know if you are still seeing his dumpsters." These communications—as requested by Commission staff—did not go to any issues related to Big Foot's application, and simply let staff know that Big Foot continued its illegal hauling operations even after filing its application with the PSC.

counsel, Ms. Hill-Hart, had provided Ms. diStefano with an advisory memorandum drafted by Ms. Hill-Hart regarding discovery motions, providing guidance to Big Foot's counsel as to how to succeed in a discovery dispute—a dispute she would oversee. *See* Dkt. 30.

Thereafter, on July 9, 2018, the Court issued its *Order on Petition for Preliminary Injunction and Writ of Mandate*. Dkt. 31. Therein, the Court found the PSC's issuance of discovery (and acting as advocate and adjudicator), as well as the ex parte communications,[5] was contrary to statute and administrative rules, and violated Appellees' constitutional due process rights to a fair hearing before a neutral adjudicator. *Id.* at 4-10. As the Court stated, "courts should not require parties to submit to demonstrably unfair administrative procedures." *Id.* at 12, *citing Wilson v. Dept. of Pub. Serv. Reg.*, 260 Mont. 167, 858 P.2d 368 (1993). The Court fashioned a remedy for this constitutional violation by enjoining the PSC from asking discovery of Appellees and by prohibiting the PSC from overseeing the hearing on Big Foot's application. *Id.* at 10-13. Taking heed of Big Foot and the PSC's concerns regarding the need to hold a hearing on Big Foot's application quickly, the Court further fashioned relief enabling such hearing to go

[5] Contrary to what Big Foot now understates, the conversations the District Court found troubling were not innuendo, and instead demonstrably provided instruction to Big Foot's counsel as to how best to proceed before the PSC.

forward by requiring that the PSC hearing take place before a neutral adjudicator appointed from Agency Legal Services. *Id.*

The PSC, displeased with the order, simply ignored the clear mandate to appoint an independent hearing examiner, without ever seeking a stay of the order.

Nearly a month later, on August 6, 2018, the PSC filed a Motion for New Trial and brief in support thereof. *See* Dkts. 34-35. Appellees responded thereto, noting that the PSC never filed an answer to the Petition, and never submitted briefing regarding Appellees' request for a writ of mandate, thus waiving any objections to the Court's order. Appellees also noted that the procedural posture of the PSC's request was inappropriate given the nature of the Petition. *See* Dkt. 36. The PSC timely filed a Reply on September 4, 2018. Dkt. 38. First Judicial District Local Rule 5(F) requires the "movant" to advise the court that a matter has been fully briefed and ready for decision by filing and serving a "Notice of Submittal." The PSC failed to file a Notice of Submittal within the time allowed for the District Court to rule on the PSC's Motion for a new trial. Consequently, (*see* Dkt. 44) the Motion was deemed denied of as of October 5, 2018, pursuant to M. R. Civ. P. 59(f). Nevertheless, on November 26, 2018, Big Foot filed a Notice of Submittal for the PSC's motion and on December 4, 2018, the PSC and Big Foot filed a Notice of Appeal with the Montana Supreme Court. Dkts. 39, 42-43.

IV. STANDARD OF REVIEW

A district court's decision to grant or deny a preliminary injunction is largely within the discretion of the district court, and the Court will only disturb a district court's decision to grant or deny a preliminary injunction upon a showing of manifest abuse of discretion. *Pinnacle Gas Resources, Inc. v. Diamond Cross Properties*, LLC, 2009 MT 12, ¶ 12, 349 Mont. 17, 201 P.3d 160 ; *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 9, 348 Mont. 68, 199 P.3d 810. "'A manifest abuse of discretion is one that is obvious, evident, or unmistakable.'" *Pinnacle Gas*, ¶ 12.

Similarly, the scope of an injunction issued is reviewed for abuse of discretion. *Sampson v. Grooms*, 230 Mont. 190, 196-97, 748 P.2d 960, 963 (1988); *see also, e.g. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (Once a plaintiff has established that they are entitled to injunctive relief, the District Court has broad discretion in fashioning a remedy, and appellate review of such remedy is for abuse of discretion).

Under MAPA appeals, and appeals regarding writs of mandate, this Court reviews the whole record to determine whether findings of fact are clearly erroneous and whether determinations of law are correct. *Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 14, 391 Mont. 120, 415 P.3d 986; *Common Cause v.*

Argenbright, 276 Mont. 382, 390, 917 P.2d 425, 429 (1996). However, under this Court's precedent, the district court's findings regarding a writ of mandate should not be reversed unless the evidence clearly preponderates against the district court's findings. *State. v. Bd. of Cty. Comm'rs of Ravalli Cty.*, 181 Mont. 177, 179, 592 P.2d 945, 946 (1979) (citations omitted).

V. SUMMARY OF ARGUMENT

The matter before the Court is simple. After finding the PSC had violated governing statutes and administrative rules and had violated Appellees' constitutional due process rights, it was both reasonable and appropriate for the District Court to grant a preliminary injunction and writ of mandate tailored to the statutory and constitutional violations found and the applicant's right to hearing. Contrary to the Appellants' arguments, such action was allowed under the applicable statutes and case law, and the District Court's Order should be affirmed.

VI. ARGUMENT

I. The District Court Found the Contested Case was Being Conducted in Violation of Montana Law and the Appellees' Constitutional Rights

As the District Court noted in its Order granting the Appellees' request for a temporary restraining Order, MAPA allows a district court to grant immediate relief "if review of the final agency decision would not provide an adequate remedy." Dkt. 31, at 5 (*quoting* Mont. Code Ann. § 2-4-701). The Court also

found Appellees "do not have an adequate remedy through the administrative agency process and petition for judicial review of any administrative decision pursuant to the Administrative Procedures Act." *Id.* at 2. The PSC and Big Foot cite *Qwest v. Mont. Dept. of Pub. Serv. Reg.*, 2007 MT 350, ¶ 32, 340 Mont. 309, 174 P.3d 496, for the proposition that relief under Mont. Code Ann. § 2-4-701 "is not justified where the only allegation of harm is speculation that further agency action *may* take place, and *if* it takes place, it *may* have legal consequences." PSC Brief at 42; Big Foot Brief at 37. However, as discussed below, Appellees did not present the District Court with speculation or innuendo regarding future harm; instead, Appellees presented direct evidence of improper conduct, and the District Court found, based on that direct evidence, the PSC had *already* violated the applicable statutes and rules for the contested case, and it had *already* violated Appellees' due process rights in two instances. There is nothing speculative or future-looking about the harm that had already occurred. The District Court was thus entitled to grant immediate relief under Mont. Code Ann. § 2-4-701.

II. The District Court Properly Issued a Preliminary Injunction

The District Court's Order here, in essence, found the Appellees had demonstrated that the PSC had violated statutes, administrative rules, and Appellees' constitutional due process rights to a fair hearing before an impartial

hearing officer. Based on those findings, the Court crafted an injunctive remedy commensurate with the harm, by enjoining the PSC from asking discovery, and by enjoining the PSC from hearing the case. Taking care to ensure such action did not delay proceedings on Big Foot's application—a concern raised by both the PSC and Big Foot—the District Court further ordered that the PSC obtain an independent hearing examiner from Agency Legal Services to oversee the hearing.

An injunction is, simply, "an order requiring a person to refrain from a particular act." Mont. Code Ann. § 27-19-101. A preliminary injunction may be issued, *inter alia*:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

See § 27-19-201, Mont. Code Ann. "[O]nly one subsection need be met for an injunction to issue." *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 180, 243 P.3d 1123 (citation omitted). The party seeking a preliminary injunction must "establish a prima facie case, or show that it is at least doubtful whether or

not he will suffer irreparable injury before his rights can be fully litigated." *Sandrock*, ¶ 16. Once that showing has been made, "then courts are inclined to issue the preliminary injunction[.]" *Bitterrooters for Planning v. Bd. of Cty. Comm'rs of Ravalli Cty*., 2008 MT 249, ¶ 15, 344 Mont. 529, 534, 189 P.3d 624.

Here, the District Court found the above three subsections applied, as the District Court concluded that, based upon the evidence presented, Appellees were entitled to the relief sought. Responding to discovery would prejudice Appellees, and the PSC's *ex parte* communications violated Appellees' due process right to a hearing before an impartial and neutral examiner. Only Big Foot argues the District Court erred in issuing an injunction on the basis that the harm was "speculative." Contrary to this, the District Court found the PSC violated statutes and administrative rules, and violated Appellee's due process rights. And, the district court is "afforded a high degree of discretion to grant or deny preliminary injunctions." *BAM Ventures v. Schifferman*, 2019 MT 67, ¶ 7, 437 P.3d 142. The District Court found the requisite elements for a preliminary injunction were met, and this finding was based upon specific evidence of improper PSC conduct which harmed Appellees and violated their due process rights. The District Court did not manifestly abuse its discretion in entering an injunction.

III. The Scope of the District Court's Relief was Appropriate

A. The Scope of the Relief was Appropriate Given the Circumstances and Considerations Before the Court

Once a court has determined that injunctive relief should issue, the court is left with the question of the scope of the injunctive relief to be granted. Of course, the purpose of a preliminary injunction is to prevent "further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits." *Knudson,* 894 P.2d at 297–98. However, a court granting an injunction must tailor its scope to protect the interests at issue in the litigation.[6] *Hoxworth v. Blinder, Robinson & Co., Inc.* 903 F.2d 186, 199 (3rd Cir. 1990); *F.T.C. v. Southwest Sunsites, Inc.,* 665 F.2d 711, 721 (5th Cir. 1982). Put another way, the court must balance competing claims of injury and consider the effect of the requested injunctive relief on all parties in fashioning the scope of the injunction granted. *French v. McLean*, 54 F.Supp.3d 1146, 1150 (D.Mont. 2014); *Sunward Electronics, Inc. v. McDonald, quoting Joseph Scott Co. v. Scott Swimming Pools, Inc.*, 764 F.2d 62, 67 (2d Cir. 1985) ("a preliminary injunction . . . must be framed in such a way as to strike a delicate balance between competing interests. By necessity, the scope of the injunction must be drawn by reference to the facts of the individual case, reflecting a careful balancing of the equities.").

[6] In fact, the federal courts hold it would be an abuse of discretion for a court to fail to attempt to tailor the injunctive relief to the facts of the matter before the court. *Hoxworth, supra.*

The PSC is mainly concerned with is the scope of the injunctive relief fashioned by the District Court.[7] However, the relief granted was specifically tailored to the facts at issue before the Court. The relief granted balanced the concerns of all the parties, and intended to maintain the last *status quo*—a situation where all parties were proceeding to a hearing before a neutral adjudicator. Since that last peaceable situation, the Court found there were pervasive statutory and constitutional violations by the PSC, both in acting as advocate to request discovery, and in allowing its staff to engage in *ex parte* conversations with Big Foot's counsel. These violations required injunctive relief. However, the Court balanced this with Appellants' concern that the application hearing timely proceed. Thus, the District Court specifically tailored the relief granted to the situation before it: it enjoined the PSC from acting as an advocate to propound discovery, and it enjoined the PSC from hearing the case. But, cognizant of the countervailing concerns of Big Foot, the District Court fashioned the remedy so the *status quo* would remain in place—per the Court's Order, the application would continue before a neutral adjudicator.

[7] The PSC also takes issue with the Court's grant of relief not sought in the Petition. However, a district court is not bound by the relief requested in the complaint, and may order any relief necessary to effectuate the Court's judgment. *Goodover v. Lindleys Inc.*, 255 Mont. 430, 438, 843 P.2d 765, 770 (1992)

The PSC takes issue with the appointment of an independent hearing examiner on the basis that Mont. Code Ann. § 2-4-611 states the Commission "may" elect to request another hearing examiner either from Agency Legal Services or from within the agency. The PSC alleges the District Court usurped this power. Incredibly, this argument—and the PSC's opening briefing as a whole[8]—completely ignores that the District Court found significant constitutional violations on the part of the PSC. These violations undermined Appellees' right to a fair hearing before a neutral adjudicator. *See* Dkt. 31. The PSC ignores that the District Court found the PSC's issuance of data requests and collusion with Big Foot's counsel deprived Appellees of their constitutional due process rights to a fair hearing before a neutral arbitrator in the proceedings before the Commission. District Court Order at 4-5. Instead, the PSC attempts to downplay the PSC's constitutional violations by re-naming the issue simply "bias."[9]

In downplaying the Court's finding, the PSC ignores that, where the Court finds constitutional violations, like violation of right to a fair hearing and neutral

[8] Of note, the PSC's opening briefing mentions the phrase "due process" precisely two times, both in the context of case explanations, with no analysis of the role of constitutional violations as the Court found here. *See* PSC Brief at 21, 36. In fact the words "constitution" and "constitutional" are never uttered in the body of the PSC's brief.

[9] While Big Foot does recognize that the District Court found constitutional due process violations, Big Foot also attempts to term the issue as "bias" (*see* Big Foot Brief at 18-25), Big Foot's analysis of due process considerations is limited to whether Appellees raised more than innuendo of wrongdoing. *Id.* at 31-36; as the Court found, there was ample evidence of constitutional violations by the PSC.

adjudicator, the Court has broad authority to fashion a remedy appropriate to the situation. *See, e.g. Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009) ("courts have leeway to fashion appropriate relief, and appellate tribunals have accorded district courts broad discretion to frame equitable remedies for constitutional violations so long as the relief granted is commensurate with the scope of the constitutional infraction." (Internal quotations omitted)); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) ("[T]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation." (Internal quotations omitted)).[10]

Here, the District Court specifically tailored the injunctive relief given the nature of the statutory and constitutional violations, and given the countervailing concerns of access to an adjudicatory body. The Court appropriately determined the PSC should be enjoined from issuing discovery, appropriately determined that the only feasible way to remove the taint of the statutory and constitutional violations was to remove the hearing from the PSC's purview, and appropriately tailored the relief to Big Foot's countervailing concern regarding its right to a hearing on its application. This Court should thus find the relief granted by the District Court was appropriate, and affirm the District Court's Order

[10] Although the foregoing cases relate to final injunctions, the issue of appropriate tailoring of relief applies no matter the stage of a matter.

B. Appointment of an Independent Hearing Examiner was Appropriate Relief

The PSC attempts to evade the proper question, which is whether the District Court manifestly abused its discretion as to the scope of preliminary injunctive relief granted. The PSC does this by arguing that the concerns regarding *ex parte* communications were not ripe for judicial review, and that the Court should have denied all consideration of the relief sought by Appellees for failure to exhaust administrative remedies. This argument fails procedurally, as well as on the merits.

First, this argument fails because it presumes the *only* reason for the District Court to grant the injunctive relief given was based upon the *ex parte* communications. To be clear, the Court additionally found a constitutional violation of Appellee's due process rights to a fair hearing before an impartial hearing examiner when the PSC adopted the mantle of both adjudicator and advocate by issuing discovery[11] and then ordering the same attorney who issued the discovery requests to decide on the propriety thereof. And, when the PSC withdrew its discovery requests, it did not admit there was any issue with the

[11] The PSC argues that any taint does not flow to Commissioners, and amounts to an "inchoate fear." PSC Brief at 35. However, the PSC Commissioners issued the discovery requests in contravention of statutes, administrative rules, and Appellee's constitutional due process rights, and thus it was entirely appropriate for the District Court to preclude Commission involvement in the hearing after such action.

agency adopting both roles, no matter the due process concerns. Thus, this alone provided substantial support for the relief granted by the District Court.

Second, the PSC's argument presupposes Appellees were aware of the nature and depth of the PSC's *ex parte* communications before they filed their Petition with the District Court. To be clear, when Appellees filed their Petition, they were aware: (1) the PSC had served discovery—for the first time in a Class D case—thus acting as both advocate and adjudicator; and (2) it appeared Big Foot had either copied the PSC's discovery requests, or had been given them as part of *ex parte* communications. *See* Petition, Dkt. 1, at ¶¶ 1-10. Appellees were not aware of whether there had in fact *been ex parte* communications until well after the Petition was filed; only learning this after Big Foot responded to discovery requests and the PSC subsequently responded to an open records request. *See* Statement of Facts, *supra*. From those responses, Appellees learned the full depth of contacts between the PSC and Big Foot—meant to provide Big Foot with legal research, pointing to documents the PSC considered useful for Big Foot to utilize, as well as unknown other advice that may have been provided in the phone conversations between the PSC's counsel and Big Foot's counsel.

After Appellees learned of this *ex parte* collusion, Appellees briefed the issue, and it was the major topic of the show cause hearing on May 16, 2018. *See*

Dkt. 17; *see, generally,* Trans.; Dkt. 22. The PSC did not submit any response to Appellees' briefing, and failed entirely to argue at the hearing that the Court should dismiss the case for failure to exhaust administrative remedies.[12] This Court has repeatedly held it will not hold a district court in error based upon an argument not raised before it. *See, e.g. Farmers Plant Aid, Inc. v. Fedder,* 2000 MT 87, ¶ 39, 299 Mont. 206, 999 P.2d 315. Thus, the Court should decline to consider the PSC's lately-found argument against the relief sought by Petitioners and granted by the District Court.

Moreover, the very case law cited by the PSC does not support its position. The PSC argues this Court has held that allegations of bias must first be raised at the agency level. PSC Brief at 21. However, the PSC fails to quote the entirety of the Court's holding analyzing claims of bias under Mont. Code Ann. § 2-4-611 in *In re Sorini*. As this Court stated there, "a party may not raise on appeal a question which was not presented before the administrative agency except the validity of the statute under which the agency is proceeding, **unless it is shown that there was good cause for failure to raise the question before the agency.**" *In re Sorini*, 220 Mont. 459, 461-62, 717 P.2d 7, 9 (1986) (emphasis added, citation omitted).

[12] The PSC's attorney did state that the "appropriate away to disqualify someone who you think has an irrevocably closed mind would be to come to the Commission . . . that has not happened here." Trans. at 66:21-23. But, staff at no point actually asked the Court dismiss the case for failure to exhaust administrative remedies. And, in any case, the PSC's attorney acknowledged that "objective irrevocable mind" activity could negate any remand. *Id.* at 67:15-68:1.

Here, as explained above, the question was not raised before the Commission because, at the outset of the Petition, Appellees had no way of knowing the scope of the *ex parte* contacts, and judicial oversight was necessary to ensure Appellees were not required to respond to improperly-made discovery requests.

Finally, the PSC's arguments are substantively lacking and, even if the Court were to examine whether Appellees should have exhausted administrative remedies, the Court should not find that such exhaustion was warranted here. This Court has recognized that an action under § 2-4-701 is an exception to the requirement for exhaustion. *Gilpin v. State*, 249 Mont. 37, 39, 812 P.2d 1265, 1266-67 (1991); *Wilson*, 260 Mont. at 172, 858 P.2d at 372. In addition, exhaustion is not required where futile. *See, e.g. Mountain Water Co. v. Mont. Dept. of Pub. Serv. Regulation*, 2005 MT 84, ¶ 16, 326 Mont. 416, 110 P.3d 20. The PSC attempts to dance around this issue by pointing out that "the mere possibility of an adverse decision does not mean that resort to an administrative agency is futile." *Id.* Here, however, the futility is shown not based upon a "mere possibility of an adverse decision" but on the PSC's statements demonstrating that the relief sought would have been futile. At the District Court's show cause hearing, the PSC's counsel stated—repeatedly—that the PSC did not believe the *ex parte* contacts were wrongful. Specifically, the PSC's attorney stated "I don't

think [conversations with the applicant's attorney] runs foul [sic] of the Commission's ex parte rule or MAPA's ex parte rules," even though he conceded that "[f]rom an appearance perspective, having one attorney at the Commission correspond with one party does not look great." Trans. 61:5-6; 63:20-22. While the PSC now argues that it *might* have *potentially* removed Ms. Hill-Hart from the case,[13] the PSC leaves out that the PSC's counsel stated "I'm not going to advocate for [that]." Trans. at 65:1-2. Instead of what the PSC now would have this Court believe, the PSC acknowledged it never intended to remove anyone for bias, but instead only acknowledged the District Court might think that bias had been demonstrated. *Id.* at 65:2-5.

In any case, the PSC does not, and cannot, address the fact that the bias stemming from its belief these *ex parte* contacts were proper flowed to the entirety of the Commission and its staff. The PSC's counsel acknowledged the PSC Commissioners and both PSC staff attorneys assigned to the matter were aware of the situation, and presumably supported counsel's arguments at hearing. Trans. at 45:21-46:10 (acknowledging that legal staff keeps the Commissioners updated on litigation, and Staff Attorney Langston had spoken with the PSC Commissioners

[13] And, the fact that she has left the Commission does not change the fact that the Commission still states nothing was wrongly done, contrary to what the District Court found.

on the matter, albeit without formal instruction from the PSC as to what litigation path to take).

And, it cannot be overemphasized that the District Court did not find a simple case of "bias." Instead, the District Court concluded the PSC's and its staff's actions, in total, amounted to a violation of governing statutes and administrative rules, and of Appellees' constitutional rights. This Court has approved of immediate review of PSC cases where due process concerns were raised. Specifically, in *Wilson v. Dept. of Public Service Regulation*, the Court found that, where the District Court's "primary concern" was the PSC's violation of the appellant's right to due process via administrative failures, the district court's actions were appropriate even though no final PSC decision had been reached. 260 Mont. at 170-172. This was because "it appears that the agency has failed to afford [the petitioners] fundamental fairness and due process." *Id.* at 172. As the Court stated, judicial review must afford an "adequate remedy" rather than "the meaningless exercise of reviewing an inadequate record formulated on the basis of unfair procedures." *Id.* at 173.

Finally, while the PSC points out it would have agreed to remove reference to examiners from the procedural order (PSC Brief at 22), the PSC never agreed to remove Ms. Hill-Hart from oversight of the case generally. And, in any case, such

relief would of course ring hollow, as the very staff attorneys and commissioners who found there were no issues with *ex parte* communications would still decide the case, under the PSC's suggestion.

C. The Court Properly Applied the Correct Standard when Determining the Scope of Injunctive Relief Granted

The District Court found statutory violations as well as two distinct due process violations and crafted an appropriate remedy. Instead of addressing these serious allegations head on, Big Foot and the PSC argue the District Court should have ignored the violations, and that it should not have granted relief without proof the PSC had an "irrevocably closed" mind, citing to *Madison River RV Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098, and *Bostwick Properties, Inc. v. Mont. Dept. of Nat. Res. & Conservation*, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

In *Madison River RV*, the appellant argued that a town council member should have been disqualified from voting on a proposed subdivision because the applicant believed the council member had a predetermined opinion on the issue and was not willing to consider the evidence at the hearing. *Id.* at ¶ 13. There was no allegation that the town council's *process* of considering and voting on the subdivision application was flawed, or that the applicant could not receive a fair hearing. Instead, the claim was that one of the council members had

predetermined his vote before the hearing. The district court found there was no evidence of predetermination, and stated "While Commissioner Kensinger did express doubts about the subdivision's effects on Ennis, these expressions of uncertainty are evidence that his mind was anything but irrevocably made up on the subject." *Id.* at ¶ 16. This Court affirmed and held, based on the standard in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 701 (1948), the applicant had failed to show the council member had an "irrevocably closed" mind before the hearing. *Id.* at ¶ 15. The PSC attempts to analogize the facts of this case to facts in *Federal Trade* by noting in that case there were "concerned 'prior *ex parte* investigations' by members of the agency." PSC Brief at 39. However, this analogy is misleading and misstates the nature of the improper *ex parte* communications found by the District Court. In *Federal Trade*, the *ex parte* investigations occurred **before** the proceeding and thus went to the issue of predetermination. *Federal Trade*, 333 U.S. at 700. Here, in contrast, the District Court found the *ex parte* communications between the PSC and Big Foot occurred during the adjudicative process and were "in direct violation of § 2-4-613, MCA." Order at 12 (The District Court found this was "consulting with the adjudicator on matters before that adjudicator"). The key difference is the PSC's *ex parte*

communications tainted the adjudicative process, and thus the PSC's analogy to pre litigation investigation *ex parte* investigations is not apt.

Unlike in *Madison River RV*, the issue facing the District Court was not an allegation that the PSC had predetermined the outcome of an otherwise fair hearing; but rather, the PSC's actions had corrupted the process. Thus, the "irrevocably closed" mind test from *Madison River RV* is not appropriate. The PSC and Big Foot also cite to *Bostwick Properties, Inc. v. Mont. Dept. of Nat. Res. & Conservation*, but misapprehend this Court's holding in that case. In *Bostwick*, the district court found the DNRC was biased towards the applicant, and rather than "consider[ing] whether [DNRC's] bias rose to the level of having an 'irrevocably closed mind' [under *Madison River R.V.*]," the Court "characterize[d] DNRC's bias as an 'unlawful procedure' [under *Erickson v. State ex rel. Bd. of Med. Exam'rs*, 282 Mont. 367, 375, 938 P.2d 625, 630 (1997)]." *Bostwick*, ¶ 53. Crucially, in both *Bostwick* and *Erickson*, the lower court found — and the Montana Supreme Court affirmed — that even though the agency decision makers were biased, their bias did not affect the outcome of the administrative hearings. *Bostwick*, ¶ 53 ("Bostwick failed to show substantial prejudice . . . [as t]he District Court independently reached the same conclusions as DNRC . . ."); *Erickson*, 282 Mont. at 375, 938 P.2d at 630 ("Erickson can show no prejudicial effect of any

conflict of interest by the hearing examiner because of the conclusive nature of the evidence against him").

Here, in contrast, the District Court found two instances where the PSC had followed an "unlawful procedure" (*ex parte* communications "in direct violation of § 2-4-613, MCA" and improperly "insert[ed] itself into the dispute by submitting discovery in violation of M. R. Civ. P. 26 and Admin. R. Mont. 38.2.3301") and found that those violations had impacted the fairness of the process. Big Foot correctly notes the District Court did not use the buzzwords "substantial prejudice" in its Order, but the Court clearly found as much based on the nature of the relief it granted. And, this Court has long adhered "to the doctrine of implied findings." *Snavely v. St. John*, 2006 MT 175, ¶ 11, 333 Mont. 16, 140 P.3d 492. The District Court rightfully found the PSC was proceeding in a manner that had prejudiced Appellees' substantial rights and it crafted an appropriate remedy to cure the tainted process.

The PSC and Big Foot also criticize the District Court for analogizing the situation to *Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, 387 Mont. 430, 395 P.3d 497. Implicit in their argument is the assertion that the PSC should be held to a lower standard of impartiality and lack of bias than a district court judge, even when the body is acting as a "court" to decide a contested case between two

adverse parties. They do not, however, identify the amount of bias this Court should tolerate in an administrative proceeding or suggest a lower standard the Court should adopt.

While the codes of judicial conduct do not directly apply to the PSC, the same principles of due process behind the codes of judicial conduct apply to a contested case process under MAPA. The irreducible constitutional minimum of due process requires a "judge **or decision maker**" who is free of actual or apparent bias. *Reichert v. State*, 2012 MT 111, ¶ 28, 365 Mont. 92, 278 P.3d 455. "[D]ue process mandates that an administrative hearing will constitute a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law." *Connell v. State, Dept. of Social and Rehabilitation Services*, 280 Mont. 491, 494, 930 P.2d 88, 91 (1997). "A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (internal quotations omitted). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The Court has specifically held the PSC "[is] not exempt from the constitutional restraints of due process requirements." *Montana Power Co. v. Public Service Comm.*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983).[14] Moreover, "due process is not a yardstick but a delicate process involving the exercise of judgment, which requires a balancing of the hurt complained of and the good accomplished" to redress due process violations by the PSC. *Id.* at 610.

The District Court found the PSC's action were an "infringement on the right of due process." Order at 10. It exercised its sound judgment in fashioning an appropriate remedy, which balanced the parties' competing interests while ensuring the parties received a fair hearing on the merits. This Court should defer to the District Court's discretion. This is especially true given that the PSC cannot establish how it would be harmed by employing a hearing examiner from a different state agency to conduct the hearing. The PSC will still be able to review the conclusions of law and findings of fact found by the hearing examiner and then issue the final order in this matter. *See* Mont. Code Ann. § 2-4-621. Thus, the only injury to the PSC is damage to it pride and reputation, but these reputational interests do not overcome the Appellees' right to fair hearing.

[14] The District Court quoted at length from *Montana Power Co.* on p. 11 of its Order but forgot to include a citation to the case. That does not excuse Appellants' failure to address *Montana Power Co.* in their briefs. The case is directly on point and the District Court correctly applied the holding of the case to facts at hand.

Because the District Court's remedy was tailored to the due process violations it found, and not because it believed the agency had predetermined the outcome, the "irrevocably closed" mind standard is not applicable. However, even if the Court were to extend the application of the standard beyond the fact pattern in *Madison River R.V.*, the District Court should be affirmed. While not specifically addressed in *Madison River R.V.* or *Federal Trade*, given the constitutional underpinnings of the issue, the question should be judged on an objective basis. *See Reichert*, ¶ 28 ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." (Internal quotation omitted)). "Under this objective standard, recusal may be required whether or not actual bias exists or can be proved" and "[t]he crucial question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* (Internal quotation omitted). The need for an objective standard is also supported by the lack of a mechanism to inquire into the subjective beliefs of the members of the PSC, as the Commissioners cannot be

asked to sit for a deposition or answer questions to examine their subjective beliefs regarding a matter.

There is more than ample evidence in the record to objectively find the PSC had an irrevocably closed mind. The District Court found the PSC, through its counsel, engaged in *ex parte* communications in violation of Mont. Code Ann. § 2-4-613, and it acted as an advocate by serving discovery—as approved by the Commissioners. Implied in the District Court's Order is the finding that the outcome of a hearing before the PSC in these circumstances may be viewed as predetermined, and that is why it mandated the hearing be conducted before an independent hearing examiner. If the District Court did not feel the outcome was preordained, it would have selected one of the less drastic sanctions favored by the PSC. The Court rejected the PSC's proposals and decided, for good reasons, to take the matter out of the agency's hands. That decision is entitled to deference, especially because it was based on the District Court's ability to observe the witnesses at the hearing and assess their capability or lack thereof, and the Court should affirm the District Court.

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IV. Even if the District Court Erred in the Scope of its Remedy, and Improperly Considered Issues Beyond the Scope of the Preliminary Injunction, the Relief Sought by the PSC Should not be Granted.

Even if this Court were to conclude the District Court's actions in reaching an injunction were improper, the PSC and Big Foot would still not be entitled to the relief they seek here, as they waived any such claim. Even if they did not, the proper remedy is remand to the District Court for further findings.

A. The PSC Waived any Right to Complain about the Scope of the Court's Decision by Failing to Respond to the Petition.

Even if this Court determines the District Court's Order reached the ultimate merits of the case, the PSC waived any right to relief therefrom by failing to timely file a response to the Petition. Appellees filed their Petition on April 9, 2018. The PSC was required to submit its answer to the Petition "in the same manner as an answer to a complaint in a civil action." Mont. Code Ann. § 27-26-302. "If no answer be made," the Court was free to decide the case "on the papers of the applicant." Mont. Code Ann. § 27-26-307. Because the PSC was mandated, but failed to, timely file an answer to the merits of Appellee's Petition, the Court was well within its powers to decide the matter in a summary fashion without trial. U.D.C.R. 2(b).

The PSC attempts to justify its failure to file an answer by stating it reserved its rights to do so at a later stage; however, there is nothing in the Montana Rules

of Civil Procedure, the Uniform District Court Rules, or the Local Rules for the First Judicial District that would allow such action. Conversely, U.D.C.R. 2(b) makes clear that the "[f]ailure to file an answer brief by the opposing party within the time allowed shall be deemed an admission that the motion is well taken." The PSC was aware of the relief sought in Appellees' Petition, but failed to file an answer thereto. It would be unjust to find the District Court committed reversible error when the PSC never even filed an answer stating why the Court should not grant the relief sought by Appellees.

Alternately, the PSC argues that no response to the Petition was required under Mont. Code Ann. § 2-4-702(4).[15] However, this provision only applies to a person who is "aggrieved by a final written decision in a contested case." *Id.* at -702(1). This statute further makes clear that the section "does not limit use or scope of judicial review available under other means to review, redress, relief, or trial de novo provided by statute." And, here, Petitioners included causes of action outside of MAPA. Dkt. 1. Given that Big Foot filed a Response (Dkt. 5), the PSC was surely on notice it likewise should do so. Because the PSC failed to timely

[15] The PSC previously relied on *Forsyth v. Great Falls Holdings* as further support for its position. 2008 MT 384. However, that case dealt with an appeal from a final agency decision under -702, and thus is unavailing in a petition under -701, which included other claims for relief, such as the instant matter.

respond to all allegations, and given the Court gave opportunity for briefing and hearing, the PSC waived any complaint regarding the Court's process.

B. If there was Error, the Proper Result is Remand to the District Court for Further Findings.

This Court has acknowledged the District Court must make findings of fact in reviewing and deciding whether to grant or deny a preliminary injunction request and, as such, the District Court's findings are granted great deference. *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 22, 348 Mont. 68, 199 P.3d 810 (citation omitted). And, here, the District Court was faced with facts demonstrating statutory and constitutional violations, coupled with its competing concerns regarding the PSC's due process violations and Big Foot's desire to move its hearing forward. As described *supra,* these concerns, coupled with the facts found, mandated the relief granted. However, if this Court concludes the District Court erred in issuing an Order addressing issues beyond the scope of a preliminary injunction, this Court's precedent is clear: the appropriate action would be to remand the case to the District Court for further proceedings, rather than rule on the expansive legal issues the PSC and Big Foot raise here. *See, e.g. Yockey v. Kearns Properties, LLC,* 2005 MT 27, ¶¶ 20-21, 326 Mont. 28, 106 P.3d 1185 (affirming District Court's decision as to preliminary injunction, but remanding the

District Court's findings which go to ultimate issues for further proceedings before the District Court).

VII. CONCLUSION

Both the PSC and Big Foot complain that Appellees' Petition has caused delay regarding Big Foot's application, but both admit improper *ex parte* communications and PSC advocacy contrary to the governing statute and administrative rule. While it is true that delay has occurred, it is not delay caused by Appellees, and it is not delay caused by the District Court. The District Court speedily and properly issued relief tailored specifically to the countervailing concerns of Appellees and Big Foot. This relief created a path to proceed to hearing, while ensuring that any hearing was fair and neutral. And, had the PSC simply appointed a hearing examiner as mandated by the District Court, the Big Foot case would have been resolved long before the filing of this brief. While the PSC claims it was mandated to file its appeal lest other parties "try the same maneuver," such action by other parties would certainly be appropriate if the PSC was likewise violating statutory mandates and the constitutional rights of those parties.

For the reasons stated herein, the Court should affirm the District Court's Order and remand this case with instructions for the PSC to submit the matter to a hearing examiner as ordered by the District Court.

DATED this 15th day of May, 2019.

DONEY CROWLEY P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *APPELLEES' BRIEF* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2013, is not more than 10,000 words, excluding this Certificate of Compliance and the Tables of Contents and Table of Authorities.

DATED this 15th day of May, 2019.

/s/ Jacqueline R. Papez

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CERTIFICATE OF SERVICE

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